



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Telos Field Engineering

File: B-257747

Date: November 3, 1994

Timothy Sullivan, Esq., Martin R. Fischer, Esq., and Judy Parker Jenkins, Esq., Dykema Gossett, for the protester. Edward S. Christenbury, Esq., Tennessee Valley Authority, for the agency. Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to obtain full and open competition in obtaining computer maintenance services is sustained where agency only provided copies of the solicitation to four firms considered to be industry leaders and failed to make any effort to distribute the solicitation to other potential sources, including the protester.

DECISION

Telos Field Engineering protests the award of a contract to Bell Atlantic Business Systems Services, Inc., under solicitation No. YL-93600E, issued by the Tennessee Valley Authority (TVA) for maintenance of IBM computer equipment, including mainframes and direct access storage devices. Telos alleges that TVA did not properly authorize a deviation from the Federal Acquisition Regulation (FAR) requirement to publish proposed contract actions in the Commerce Business Daily (CBD). The protester also argues that it was unreasonably denied an opportunity to compete for this requirement and that TVA failed to comply with applicable competition requirements.

We sustain the protest.

BACKGROUND

TVA issued the solicitation on December 3, 1993, seeking comprehensive maintenance of TVA data processing equipment located at several TVA facilities. The equipment is used in connection with TVA's electric power generation program. The agency states that data such as TVA's worker radiation

exposure information and nuclear safety-related drawings reside in the mainframe computers.

The solicitation provided that award would be made to the offeror whose proposal was determined to be "the most advantageous to TVA" based on the agency's assessment of price and technical factors. The RFP included a 23-page list of equipment to be serviced under the contract, including TVA's IBM 9021 mainframe computers. The solicitation also provided, under section C.10, "EXPERIENCE," that "[c]onsideration will be given only to offerors who, in TVA's sole judgment, have at a minimum, demonstrated four (4) years of satisfactory experience in the maintenance and support of equipment and systems equivalent to those covered under this solicitation document."

TVA did not publish a synopsis of the proposed contract action in the CBD. The procurement is funded using revenues derived from TVA operations and consequently TVA was not required by statute to publish a synopsis. See 15 U.S.C. § 637 note (1988); 41 U.S.C. § 416 note (1988). Consistent with this statutory exemption, in 1992 TVA established a class deviation from the FAR requirement to synopsise its requirements in the CBD for purchases funded by revenues from TVA's Power program.

TVA states that it "selected" four potential suppliers to receive the solicitation. Specifically, the contracting officer requested that the TVA ADP (automated data processing) procurement specialist provide a list of prospective vendors. The ADP specialist, in turn, contacted two TVA managers responsible for automation support and operation support, both of whom had provided input in the preparation of the specifications. The ADP specialist requested a "list of prospective vendors . . . considered to be industry leaders in the field of mainframe maintenance." The managers provided the contracting officer a list of four firms, including IBM and Bell Atlantic. Only those four firms were provided copies of the solicitation. Telos was not on the list and did not otherwise learn of the procurement until after award. TVA received two proposals and awarded the contract to Bell Atlantic for a base and 4 option years valued at approximately \$3 million.

After learning of the award, Telos filed this protest alleging that it should have been given an opportunity to compete for the requirement. First, Telos contends that TVA failed to comply with the procedural requirements for authorizing the class deviation from the FAR synopsis requirement. Telos argues that while the FAR requires agencies seeking such a deviation to "consult" with the chairperson of the Civilian Agency Acquisition Council (CAA

Council), FAR § 1.404(a)(1), TVA simply wrote a letter and justification to the chairperson and apparently did not receive a response. Second, Telos asserts that TVA never informed Telos about the solicitation despite the fact that Telos currently provides IBM hardware maintenance services for TVA and many other federal agencies. Telos argues that the procedures used by TVA to acquire these services "did not even approximate" full and open competition as mandated by statute and regulation.

TVA responds that it was not required by statute to synopsise the procurement action in the CBD and that it properly authorized a deviation from the FAR synopsis requirement. The agency also asserts that it did not violate the FAR requirement for full and open competition. While the FAR provides that full and open competition exists when all responsible sources are permitted to compete, FAR § 6.003, based on correspondence between counsel for Telos and counsel for TVA after the award of the contract, TVA argues that Telos should not be considered a "responsible" source, since, in its view, Telos could not meet the solicitation's experience requirement.

DISCUSSION

TVA has broad authority to determine the extent to which it will comply with the procurement procedures in the Federal Property and Administrative Services Act of 1949 and, by extension, the competition requirements of the Competition in Contracting Act of 1984 and implementing regulations.¹ 40 U.S.C. § 474(12) (1988). However, TVA's authority not to comply with the Federal Property and Administrative Services Act of 1949 does not extend to the provisions governing acquisition of automatic data processing equipment. See 40 U.S.C. § 759(a). Consequently, the implementing FAR applies to this procurement. 40 U.S.C. §§ 472(a) and (b), and 759(a) (1988); 41 C.F.R. § 201-39.102(b) (1993); Telos Field Eng'g, 73 Comp. Gen. 39 (1993), 93-2 CPD ¶ 275.

With respect to the FAR requirement that agencies synopsise procurement actions in the CBD, TVA has properly exempted itself. A FAR deviation was authorized by TVA's designated senior official responsible for the acquisition of ADP equipment, and this official notified the chairperson of the CAA council in writing of the deviation and the reasons supporting the decision. In our view, this constitutes compliance with the procedures for deviations set forth in

¹TVA is subject to the bid protest provisions of the Competition in Contracting Act because it falls within the definition of "federal agency" to which those provisions apply. 31 U.S.C. § 3551(1); 40 U.S.C. §§ 472(a) and (b).

section 1.404(a) of the FAR. Publication in the CBD does not, however, end an agency's obligation to achieve "full and open competition" as required by FAR § 6.101(b). We conclude that TVA did not meet this obligation.

"Full and open competition" is obtained where all responsible sources are permitted to compete, FAR § 6.003. It is a contracting agency's obligation to use reasonable methods as required by the FAR for the dissemination of solicitation documents to prospective contractors, Davis Enters., B-249514, Dec. 4, 1992, 92-2 CPD ¶ 389. For instance, the FAR provides that solicitation mailing lists are to be maintained by contracting activities, that lists are to include those capable of filling agency requirements, and that solicitations be sent to those on the lists. FAR §§ 14.203-1, 14.205-1, and 15.403.

Here, TVA did not maintain a mailing list of potential vendors and did not take the basic and reasonable steps necessary to ensure that the procurement was open to all potential sources. TVA officials essentially concede that providing copies of the solicitation to four known firms did not constitute full and open competition. In a declaration submitted by TVA in response to a request from our Office, one of the managers states that the four companies listed were recommended firms that "I thought could best provide the maintenance services." He states further that "I did not intend that these four companies be the only companies that would receive the solicitation." The other manager states in her declaration that she named companies that she "had knowledge of, but that there could be others." She concludes that "I rely on our contracting officers for the actual bid process." While these managers apparently expected that the contracting officer would use other means to obtain full and open competition, no further steps were taken. TVA could have called other users of similar services, reviewed previous similar procurements, or reviewed other TVA computer maintenance contracts to identify potential vendors. Any one of these steps would have revealed Telos, a current TVA contractor which has had numerous maintenance contracts with federal agencies and has been a competitor under previous TVA procurements.

We do not accept the agency's conclusory assertion, introduced for the first time in the agency's response to the protest, that Telos should not be considered a responsible source required to be included in the procurement. Since Telos was not given the opportunity to submit a proposal discussing its experience and qualifications, the TVA evaluators or officials familiar with the requirements at issue have not had an opportunity to consider (and have not expressed an opinion on this record as to) whether Telos has the requisite experience

servicing "equipment and systems equivalent to those covered under this solicitation document."

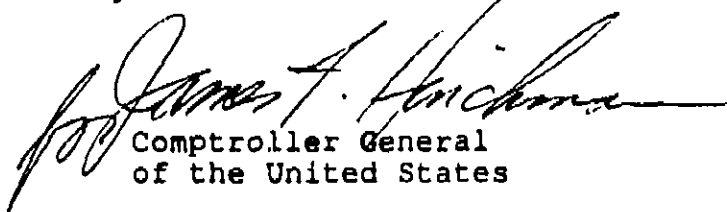
On the other hand, Telos has responded to the agency's assertion that it is not a responsible source by providing a list of contracts under which it maintains equipment Telos believes to be similar to the type to be serviced here. Specifically, Telos states that it has more than 1,000 contracts to maintain computer hardware covering equipment sold by nearly every manufacturer including "mainframe equipment items and peripherals such as IBM's ES9000/3090 family of mainframes and their associated 3880/3990 controllers, 3380/3390 hard disk drives, 3420/3480 tape drives as well as the 3800/4245 large printing systems." The agency states that the IBM 9021 mainframe computer, the model listed in the solicitation, "fall[s] within the IBM series ES 9000 mainframe computers" and that the IBM 9021 is "substantially similar to IBM's 3090J series of mainframe computers." Given this apparent similarity and the fact that at least one of the contracts listed by Telos dates back to 1990, we cannot agree on this record that Telos could not reasonably be considered a responsible source.

Under these circumstances, we find that the agency failed to satisfy its obligation to obtain full and open competition, and we sustain the protest on this ground.

RECOMMENDATION

We recommend initially that the agency promptly prepare an appropriate mailing list containing potential vendors and maintain such a list in accordance with the FAR. TVA should then issue a new solicitation and provide copies to all known potential sources, including Telos. If, after evaluating the offers received, TVA determines that an offeror other than Bell Atlantic has submitted the most advantageous offer, TVA should terminate Bell Atlantic's contract and award to that offeror. We also find that Telos is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1), Telos's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to TVA within 60 days after receipt of this decision.

The protest is sustained.


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